No. 96-1201

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, *et al.*,

Petitioners,

v.

DAVID M. BEASLEY, GOVERNOR OF SOUTH CAROLINA, *et al.*,

Respondents.

On Petition of a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION FOR THE SOUTH CAROLINA SENATE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should consider the validity of the so-called "catalyst" theory for awarding attorneys' fees under 42 U.S.C. §§ 1973l(e) and 1988(b), where, even if that theory were applied, Petitioners still would not be entitled to attorneys' fees because the trial court did not abuse its discretion in determining that whatever successes Petitioners achieved in the litigation were *de minimis*?

2. Whether the courts below abused their discretion in concluding that relief obtained by Petitioners in the form of a court order requiring the Senate to obtain preclearance of a district for use in a special election pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, was *de minimis,* in light of the fact that the district was precleared without any objection from the Department of Justice and was used without any changes in the special election?

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STATEMENT OF THE CASE

I. THE UNDERLYING LITIGATION

This case arises out of South Carolina's efforts in the early 1990s to redraw its state legislative and congressional districts. Not surprisingly, the 1990 census figures revealed that the boundaries of the districts drawn in the 1980s had become unconstitutionally apportioned and, therefore, had to be redrawn. *See* Appendix to Petition for Writ of Certiorari ("App.") 4, 12. Both the State House and Senate formed subcommittees to develop new redistricting plans, but were unable to pass plans prior to adjournment of the General Assembly's 1991 legislative session. App. 4.

A. Proceedings In The Three-Judge Court

In October 1991, Michael Burton, in his capacity as Executive Director of the South Carolina Republican Party ("Republican Party"), and the Statewide Reapportionment Advisory Committee ("SRAC"), an unincorporated association of private individuals and organizations in South Carolina that advances the interests of African-Americans (collectively, "Petitioners"), brought separate suits challenging the state legislative and congressional districts drawn in the 1980s. *See* App. 4, 13; *Burton v. Sheheen*, 793 F. Supp. 1329, 1337-38 (D.S.C. 1992), *vacated and remanded sub nom. Statewide Reapportionment Advisory Committee v. Theodore*, 508 U.S. 968 (1993). Both complaints alleged that these districts were unconstitutionally apportioned and violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and sought an injunction precluding any future use of these districts, a declaration that the legislative process was at an impasse, and an order adopting redistricting plans proposed by each Petitioner. *See* App. 13. The two cases

were consolidated before a three-judge court pursuant to 28 U.S.C. § 2284, which requires that challenges to the constitutionality of a statewide redistricting plan be heard by such a court. *See* App. 4, 13. The State Senate obtained permission to intervene, along with the South Carolina Democratic Party and others. *Burton*, 793 F. Supp. at 1338.

In January 1992, the General Assembly reconvened and passed reapportionment plans for the State House and Senate, but the Governor vetoed them and the General Assembly was unable to override the veto. App. 13. The General Assembly was unable to agree on a congressional redistricting plan. App. 13. In February 1992, all parties agreed that the legislature was at an impasse, and the three-judge court assumed the role of overseeing design and implementation of new redistricting plans for the 1992 elections. *See* App. 13.

In February 1992, a three-week trial began. All parties stipulated that the existing districts were unconstitutionally apportioned, *Burton*, 793 F. Supp. at 1336 n.2, and no party contended that they be used in the 1992 elections. Thus, no trial time was devoted to these issues. App. 20. Moreover, because all parties agreed that the existing districts were unconstitutional, the three-judge court found it unnecessary to consider whether these districts also violated Section 2 of the Voting Rights Act. *Burton*, 793 F. Supp. at 1336 n.2. Rather, the trial focused on the various redistricting plans advocated by each of the parties.

In May 1992, the three-judge court rejected all of the parties' proposed plans, finding that they "suffered an array of infirmities." *Burton*, 793 F. Supp. at 1369. In particular, the three-judge court found that the Republican

Party's proposed plan "disregard[ed] . . . county lines and communities of interest" in an effort to "garner [more] black voters" and failed to observe South Carolina's traditional redistricting policies. *Id.* at 1360. The three-judge court further stated that "the same maladies that afflict the . . . Republican Party's plan, i.e. splitting county . . . [and] precinct lines, afflict the SRAC plan." *Id.* at 1359 n.58. The court proceeded to draw its own plans, which contained fewer black-majority districts than those proposed by Petitioners for the State House and Senate and "did not remotely resemble the plans proposed by either [Petitioner]." *Id.* at 1365-66; App. 24-25.

In explaining the plans it fashioned, the three-judge court stated that it had attempted to follow what it viewed as the State's policy of adhering to county lines in drawing districts. *Burton*, 793 F. Supp. at 1341. The court also discussed its adherence to the "one person, one vote" rule and Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, in drawing its plans. *Id.* at 1342-48. The court declined, however, to conduct a full analysis of whether its plans complied with Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. *Id.* at 1350-51.

B. Proceedings In The Supreme Court

Having failed to obtain implementation of the plans it preferred, the SRAC (but not the Republican Party) appealed the three-judge court's decision to this Court. While the United States was not a party in the trial court, this Court requested the views of the Solicitor General. *Statewide Reapportionment Advisory Committee v. Theodore*, 506 U.S. 951 (1992).

On June 14, 1993, this Court vacated the lower court's judgment and remanded for "further consideration in light of the position presented by the Acting Solicitor

General in his brief for the United States." *Statewide Reapportionment Advisory Committee v. Theodore*, 508 U.S. 968 (1993). In his brief, the Solicitor General argued that the three-judge court (1) failed to perform a plenary analysis of whether its plan complied with Section 2 of the Voting Rights Act; (2) improperly considered preservation of county lines as the predominant state policy in redistricting; and (3) improperly subordinated the requirements of Section 2 to the policy of preserving county lines. Brief for the United States as Amicus Curiae, *Statewide Reapportionment Advisory Committee v. Theodore*, 508 U.S. 968 (1993) (Nos. 92-155 and 92-219), at 9-17. While the Court remanded the case, it did not vacate the 1992 elections, which had been held using the three-judge court's plans. App. 14.

C. Proceedings On Remand

On remand, the three-judge court provided the General Assembly with an opportunity to develop and obtain preclearance of new plans for future use.[1] In 1994, the General Assembly passed and obtained preclearance of a congressional redistricting plan and a plan for the State House, which were used in the 1994 elections. *See* App. 14. Neither the SRAC nor the Republican Party

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[1] Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, requires certain jurisdictions, including South Carolina, to obtain prior approval, known as "preclearance," of changes in laws, practices, or procedures affecting voting. *See Georgia v. United States*, 411 U.S. 526, 534-35 (1973) (holding that Section 5 applies to redistricting plans). To obtain preclearance, such jurisdictions must prove either to the United States Attorney General or to a three-judge district court in the District of Columbia that the proposed change has neither a discriminatory purpose nor a discriminatory effect. 42 U.S.C. § 1973c.

challenged these precleared plans. Petition for Writ of Certiorari ("Pet.") 5-6.

In June 1994, while the General Assembly was still developing a new redistricting plan for the Senate, which did not have a scheduled election until 1996, a vacancy occurred in Senate District One when the incumbent was elected to a judgeship. *See* App. 14-15. (Senate District One is in the northwestern corner of the State. It is a predominantly white rural district. All parties to the *Burton* litigation drew this district in similar ways; it was not one of the districts as to which the parties were in dispute regarding its racial composition.) The Senate sought permission to hold the special election using the district lines drawn by the three-judge court. App. 15. The Senate took the position that, because the district had been drawn by the court, its use in the special election did not have to be precleared by the Department of Justice ("DOJ"). *See Connor v. Johnson*, 402 U.S. 690 (1971) (holding that court-drawn redistricting plans are not subject to the preclearance requirement). DOJ disagreed, as did the SRAC and the Republican Party. The three-judge court denied the Senate's request and held that the use of the district had to be precleared. App. 15. Thus, the Senate submitted the district to DOJ, obtained preclearance, and conducted a special election using the same district the three-judge court had drawn in 1992. *See* App. 15. The outcome of this election had no effect on the racial makeup of the Senate.

In May 1995, the General Assembly enacted a new redistricting plan for the Senate and obtained preclearance. App. 15. Neither the SRAC nor the Republican Party objected to this plan. Pet. 6-7. In short, by June 1995, the General Assembly had passed, and obtained preclearance of, a new congressional redistricting plan and

new plans for the State House and Senate. App. 6. Two months later, the three-judge court dismissed the entire case. App. 6.[2]

II. THE ATTORNEYS' FEES LITIGATION

A. Proceedings In The Three-Judge Court

The SRAC and the Republican Party each subsequently requested attorneys' fees under 42 U.S.C. §§ 1973l(e) and 1988(b), contending that they were "prevailing parties" in the redistricting litigation within the meaning of those statutes and thus entitled to fees. App. 6. The three-judge court denied the motions in their entirety. App. 31. To be a "prevailing party," the three-judge court stated, a plaintiff must obtain "'some relief on the merits of his claim,'" in the form of either "'an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement.'" App. 17 (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)).

Applying these standards, the three-judge court found that "as a matter of law [Petitioners] cannot be considered prevailing parties because an enforceable judgment against the defendants no longer exists." App. 18. The court noted that while its opinion in *Burton* constituted a judgment on the merits, Petitioners "could

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[2] Although Petitioners do not refer to the events following the enactment of state legislative and congressional redistricting plans, many of the black-majority districts in the State House and Senate that were drawn after the remand from the Supreme Court were subsequently held unconstitutional on the grounds that race was a predominant factor in the drawing of these districts, and that the districts were not narrowly tailored to achieve a compelling government interest. *See Smith v. Beasley*, 946 F. Supp. 1174, 1210 (D.S.C. 1996).

no longer enforce" that order "because the Supreme Court vacated it." App. 18.

Turning to the Republican Party's claim that its lawsuit had acted as a catalyst in causing the State to redistrict, the three-judge court held that claim must fail because the Fourth Circuit had "rejected the catalyst theory as a means of determining who is a prevailing party." App. 18 (citing ***S-1 and S-2 v. State Bd. of Educ.***, 21 F.3d 49 (4th Cir.) (en banc), ***cert. denied***, 115 S. Ct. 205 (1994)). (Under this theory, a plaintiff may be deemed a "prevailing party" eligible for attorneys' fees even if he did not succeed on some aspect of the merits of his case so long as his lawsuit was the catalyst that caused non-judicial branches of government to provide the desired relief to the plaintiff. *See* App. 9, 10.)

The three-judge court went on to find, however, that regardless of the validity of the "catalyst" theory, the SRAC and the Republican Party "would not be entitled to attorneys' fees under ***any*** theory because their successes were only technical or ***de minimis.***" App. 19 (emphasis added).

The three-judge court first found that Petitioners had not achieved significant relief in obtaining a declaration that the existing districts were malapportioned and an injunction against their future use. The court explained that "the issue of whether the existing plans were constitutional was . . . never in dispute before this court. Further, this issue consumed virtually none of the court's time . . . . Similarly, since all parties agreed the existing plans were unconstitutionally apportioned, it strains reason to suggest the issue of whether these plans could continue to be employed was a significant one." App. 20. Because a party must "succeed on a significant issue" to qualify as a

"prevailing party," the court reasoned, Petitioners could not be considered "prevailing parties" on the issues of malapportionment and continued use of the existing districts. App. 20.

The three-judge court next found that Petitioners were not "prevailing parties" on the question of whether a legislative impasse existed. The court observed that, although it had found in February 1992 that an impasse existed, this ruling was merely a "procedural" one that "allowed the case to proceed to trial" and "in no way affected the merits." App. 22. Moreover, like the issue of whether the existing districts were malapportioned, the impasse question was essentially undisputed. *See* App. 13 ("On February 10, 1992, the court convened a status conference at which all parties agreed that the legislative process was at an impasse with respect to redistricting."). Accordingly, the court found that "because the impasse issue was not significant and the agreement failed to change the legal relationship between [Petitioners] and the defendants, . . . [Petitioners] are not prevailing parties on the impasse issue." App. 23.

The three-judge court next considered whether Petitioners qualified as "prevailing parties" based on the state legislative and congressional redistricting plans implemented by that court. The court first rejected the Republican Party's claim that it had been a catalyst in the court's decision to draw a black-majority congressional district, observing that none of the parties at trial had opposed the creation of such a district. App. 23-24.

The three-judge court likewise rejected the claim of the SRAC that it had prevailed by causing the court to implement new state legislative and congressional redistricting plans.

> The obvious motive and goal of [Petitioners] was to get their plan adopted by the court. As this court made abundantly clear in the underlying order, the plans presented by the parties suffered a myriad of infirmities. In addition, we emphasized the plans we fashioned were our own and did not remotely resemble the plans proposed by either [Petitioner]. . . . Thus, it cannot be credibly asserted that [Petitioners] "prevailed" in the creation of the interim plans this court ordered . . . .

App. 24-25 (note omitted).

By contrast, the three-judge court found that the SRAC had prevailed in having the three-judge court's judgment vacated by this Court. App. 27. Nonetheless, the three-judge court declined to award the SRAC any attorneys' fees, stating:

> In essence, what the SRAC achieved was a situation where the Supreme Court's order vacated the judgment, but left undisturbed the actions performed under the judgment. Indeed, the Supreme Court did not invalidate the 1992 Senate elections held pursuant to the vacated court order. And, in addition, the period whereby the court-drawn plans ceased to exist was short-lived. In 1994, the General Assembly passed a House of Representatives' act which became law and later was precleared for use by the DOJ. Also in 1994, a plan for the congressional districts was passed and

precleared. Then, in 1995, a Senate Act became law and was also precleared.

App. 29. In light of these facts, the three-judge court concluded that the SRAC's success on appeal was "merely technical and *de minimis.*" App. 29.

The three-judge court also found that Petitioners were "prevailing parties" on the question of whether the Senate had to obtain preclearance in order to use the court-drawn District One for a special election to fill a vacancy. App. 25-26. The three-judge court reasoned that the order requiring the Senate to obtain preclearance was enforceable by Petitioners and, therefore, satisfied *Farrar*'s requirement that a plaintiff have an enforceable judgment. App. 26. The three-judge court denied attorneys' fees on this issue, however, finding that "[i]n light of the DOJ's subsequent preclearance of the plan, [Petitioners'] victory was pyrrhic at best. While [Petitioners] were successful in having the plan submitted for preclearance, the election ultimately was conducted pursuant to the 1992 plan," the very plan that the Senate had advocated using. App. 26. Accordingly, the court found that Petitioners' victory on this issue was *de minimis* and, therefore, did not justify an award of attorneys' fees. App. 29.

B. Proceedings In The Court Of Appeals

The Court of Appeals for the Fourth Circuit affirmed the denial of attorneys' fees for all aspects of the litigation. App. 8.[3] Stating that the issue presented for appeal was whether the SRAC and the Republican Party

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[3] Unlike cases related to the merits of a redistricting plan, which are appealed directly to this Court pursuant to 28 U.S.C. § 1253, disputes concerning awards of attorneys' fees are appealed to the intermediate circuit courts of appeals.

were "prevailing parties," the court concluded that its previous decision in *S-1 and S-2*, 21 F.3d at 51, had "rejected 'catalyst' analysis of causation in determining prevailing party status" on the grounds that this theory could not be reconciled with this Court's holding in *Farrar*. App. 6-7. Applying *S-1 and S-2* to the instant case, the court of appeals held that Petitioners did not qualify as "prevailing parties." App. 8. The court of appeals reasoned that because the three-judge court's judgment on the merits was vacated on appeal, Petitioners could not enforce that judgment against the defendants. App. 8. The court of appeals further held that this Court's order vacating and remanding to the three-judge court for further consideration did not constitute an enforceable judgment against the defendants. App. 8. Finally, the court of appeals held that Petitioners' success concerning the Section 5 preclearance claim was too insignificant to qualify them as "prevailing parties." App. 8.

In a concurring opinion, Judge Niemeyer agreed with the majority that *S-1 and S-2* had rejected the "catalyst" theory. He also agreed that, to be a "prevailing party," a plaintiff "must obtain relief in the action on the merits of his claim," and he stated that success in the political process does not satisfy that requirement, even if the political success was a response to the litigation. App. 9. Finally, Judge Niemeyer concluded that even if "prevailing party" status was determined by examining the results obtained through the political process, he "could not conclude that the district court abused its discretion in denying the [Petitioners'] attorneys fees." App. 9.[4]

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[4] Judge Motz also concurred, indicating that, in her view, Petitioners would have prevailed under the "catalyst" theory but that the court of appeals was bound by its prior rejection of that theory. App. 9-10.

SUMMARY OF ARGUMENT

1. The alleged conflict among the circuit courts concerning the viability of the "catalyst" theory to justify an award of attorneys' fees under 42 U.S.C. §§ 1973l(e) and 1988(b) is not properly presented to the Court on the facts of this case. Petitioners never asked the court of appeals to reconsider its rejection of the "catalyst" theory. In fact, Petitioners expressly disavowed reliance on that theory for determining whether they were "prevailing parties." The court of appeals thus did not have the opportunity to consider anew the merits of the theory. In the absence of such consideration, this Court ought not to grant certiorari. *See infra* pp. 15-16.

2. Regardless of whether the "catalyst" theory applies, Petitioners are not entitled to recovery of attorneys' fees because any arguable successes they achieved in the litigation were *de minimis* and, therefore, too insignificant to qualify them for attorneys' fees. The three-judge court analyzed each of Petitioners' claims for attorneys' fees separately and determined, in the exercise of its sound discretion, that given the *de minimis* nature of each success, Petitioners were not entitled to fees under any theory. Because the three-judge court did not abuse its discretion in determining that Petitioners are not entitled to recover fees under any theory, and because its decision was entirely consistent with the principles set forth by this Court governing recovery of attorneys' fees under 42 U.S.C. §§ 1973l(e) and 1988(b), resolution of the viability of the "catalyst" theory will not affect the outcome of this case. *See infra* pp. 16-27.

REASONS FOR DENYING THE WRIT

ANY CONFLICT AMONG THE CIRCUITS REGARDING THE "CATALYST" THEORY NEED NOT BE RESOLVED HERE BECAUSE DENIAL OF ATTORNEYS' FEES IS PROPER BASED ON GROUNDS WHOLLY UNRELATED TO THAT THEORY

This is a case where Petitioners seek well over $500,000 in attorneys' fees despite obtaining essentially none of the relief they sought. As the three-judge court recognized, what the SRAC and the Republican Party really wanted was an order imposing their proposed redistricting plans. Petitioners failed completely in this regard: the three-judge court rejected their plans out of hand because they suffered "an array of infirmities." *Burton*, 793 F. Supp. at 1369. As the Senate now demonstrates, the only issues on which Petitioners even arguably succeeded were either uncontested, procedural, or insignificant. Thus, the denial of attorneys' fees by the lower courts was entirely appropriate, and this Court should not grant certiorari.

I. Introduction

Section 1988 of Title 42 of the United States Code provides, in relevant part:

> In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988(b). Section 1973l(e) of Title 42 of the United States Code contains virtually identical "prevailing

party" language.[5] Therefore, this Court has indicated that these provisions should be similarly construed. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980).

This Court has held that to be deemed a "prevailing party" within the meaning of these provisions, a plaintiff must succeed on a "'significant issue in litigation.'" *Hensley*, 461 U.S. at 433 (citation omitted); *Farrar*, 506 U.S. at 109. Moreover, that victory must consist of some relief on the merits in the form of "an enforceable judgment against the defendant from whom fees are sought or comparable relief through a consent decree or settlement." *Farrar*, 506 U.S. at 111 (citation omitted). Whatever the form of relief, it must materially alter the legal relationship of the parties. *Id.* Moreover, a *de minimis* or purely technical victory, even if it suffices to make a plaintiff a "prevailing party," does not justify an award of attorneys' fees. *Id.* at 112-13; *see also Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989). In the present case, when the litigation concluded, Petitioners did not have an enforceable judgment against the defendants, nor a consent decree or settlement agreement with the defendants. For this reason alone, the petition for certiorari should be denied.

Petitioners nonetheless contend that the court of appeals erred by rejecting the so-called "catalyst" theory for determining "prevailing party" status. Pet. 9, 12-13. Under this theory, in certain circumstances, a plaintiff can obtain attorneys' fees, even if he does not prevail on a

[5] Specifically, Section 1973l(e) provides, "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1973l(e).

significant issue in court, if his lawsuit prompts remedial action by a defendant. *See, e.g., Brown v. Local 58, Int'l Bhd. of Elec. Workers*, 76 F.3d 762, 771-72 (6th Cir. 1996). Petitioners claim that the Fourth Circuit's rejection of the "catalyst" theory conflicts with the approach taken by all other circuits, and request that this Court grant certiorari to resolve the alleged conflict.

II. This Court Should Deny The Writ Because Petitioners Disclaimed Reliance On The "Catalyst" Theory In The Court Below As A Means Of Satisfying The "Prevailing Party" Requirement

At the outset, the Senate notes that the central issue Petitioners present here differs from any of the arguments they advanced in the court of appeals. There, Petitioners disclaimed any reliance on the "catalyst" theory as a means of satisfying the "prevailing party" requirement of both 42 U.S.C. §§ 1973l(e) and 1988(b). *See* Reply Brief for Plaintiffs-Appellants 10 (filed April 19, 1996) ("Reply Br.") ("Appellants do not claim . . . that they are prevailing parties based on catalyst theory.") (attached as Appendix). Petitioners never requested the Fourth Circuit to revisit its ruling in *S-1 and S-2* rejecting the "catalyst" theory as a basis for determining "prevailing party" status. Instead, Petitioners contended that courts should consider the "catalyst" theory in determining the *amount* of an award *after* "prevailing party" status had already been determined. Reply Br. 10 (Appendix). In their petition for certiorari, by contrast, Petitioners frame the issue as "[w]hether the court of appeals erred in rejecting . . . [the] 'catalyst' theory of causation in determining prevailing party status under 42 U.S.C. §§ 1973l(e) and 1988 . . . ." Pet. i.

While this Court is, of course, authorized to consider Petitioners' new argument, *see Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995), the Senate respectfully suggests that, in the absence of a plenary debate in the court of appeals on the issue that Petitioners present here, a grant of certiorari is not appropriate in this case. *Cf. City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts."); *see also Bly v. McLeod*, 605 F.2d 134, 138 (4th Cir. 1979) (refusing to rule on basis of "catalyst" theory because the plaintiff did not raise the argument in the court below), *cert. denied*, 445 U.S. 928 (1980).

III. The Three-Judge Court Acted Well Within Its Discretion In Holding That Petitioners Were Not Entitled To Attorneys' Fees Under Any Theory Because Any Success They May Have Achieved Was *De Minimis*

Even if this Court should choose to consider Petitioners' new argument, the alleged conflict among the circuit courts need not and should not be resolved in this case because, regardless of whether the "catalyst" theory remains viable, the three-judge court acted well within its discretion in denying attorneys' fees on other grounds. Thus, certiorari should be denied because, whether or not the Fourth Circuit's reasoning conflicts with that of other circuits concerning the "catalyst" theory, the outcome of this case remains the same.

A. The Three-Judge Court Held That, Even Under The "Catalyst" Theory, Petitioners Were Not "Prevailing Parties" Because Whatever Successes They Achieved Were Insignificant

Petitioners essentially contend that they would have been entitled to recovery of attorneys' fees if the Fourth Circuit had applied the "catalyst" theory to this case. This argument, however, overlooks two crucial points. First, this Court has expressly held that while plaintiffs must be deemed "prevailing parties" to be eligible for recovery of attorneys' fees under 42 U.S.C. §§ 1973l(e) or 1988(b), *Hensley*, 461 U.S. at 433 & n.7, that determination alone does not warrant an award. If the claims on which plaintiffs prevail are purely technical or *de minimis*, an award of attorneys' fees is not justified. *Farrar*, 506 U.S. at 112-13; *see also Texas State Teachers Ass'n*, 489 U.S. at 792.

Second, Petitioners overlook the fact that while the court of appeals may have refused to apply the "catalyst" theory, the three-judge court held that "[Petitioners] would not be entitled to attorneys' fees under *any theory* because their successes were only technical or *de minimis*." App. 19 (emphasis added). Because the three-judge court made clear that the "catalyst" theory was included among the theories it considered in making this determination, App. 18-19, whether or not Petitioners' lawsuit operated as a catalyst for legislative action, Petitioners were not entitled to attorneys' fees. Thus, the applicability of the "catalyst" theory has no bearing on the outcome of this case.

B. The Three-Judge Court's Determinations Regarding Attorneys' Fees Must Be Upheld Absent An Abuse Of Discretion

Both 42 U.S.C. §§ 1973l(e) and 1988(b) explicitly grant a district court "discretion" to award attorneys' fees. In accordance with the statutory language, the circuit courts have consistently held that a district court's determinations as to "prevailing party" status and the amount, if any, of an attorneys' fees award should be reviewed only for abuse of discretion. *Goehring v. Brophy*, 94 F.3d 1294, 1304-05 (9th Cir. 1996) (district court's finding that plaintiff's lawsuit was not a catalyst was deemed not an abuse of discretion); *Brown*, 76 F.3d at 771; *Ruffin v. Great Dane Trailers*, 969 F.2d 989, 991-92 (11th Cir. 1992), *cert. denied*, 507 U.S. 910 (1993); *Libby v. Illinois High Sch. Ass'n*, 921 F.2d 96, 98 (7th Cir. 1990); *see also Kansas Health Care Ass'n v. Kansas Dep't of Social & Rehabilitation Servs.*, 31 F.3d 1052, 1053 (10th Cir. 1994) ("prevailing party" determination is reviewed under clearly erroneous standard). Moreover, the district court's findings of fact underlying these determinations are reviewed only for clear error. *Corder v. Gates*, 104 F.3d 247, 249 (9th Cir. 1996); *Goehring*, 94 F.3d at 1304; *Brown*, 76 F.3d at 771; *Kansas Health Care*, 31 F.3d at 1053.

C. The Three-Judge Court Ruled Consistently With The Case Law And Did Not Abuse Its Discretion

As the three-judge court observed, App. 19, Petitioners initially sought four types of relief: (a) a declaration that the existing districts were unconstitutional, (b) an injunction prohibiting their future use, (c) a declaration that the legislative process was at an impasse,

and (d) adoption of the redistricting plans proposed by Petitioners. The three-judge court found that Petitioners had achieved only minimal success on these requests for relief. As demonstrated below, the three-judge court did not abuse its discretion.

(a), (b) The three-judge court accurately noted that the issues of whether the existing districts were unconstitutional and whether they could be used again were essentially undisputed. App. 20. These issues were conceded by the defendants in their answers to the complaint, and stipulated to before trial. App. 20; *Burton*, 793 F. Supp. at 1336 n.2. Consequently, these issues consumed almost none of the court's time and were disposed of by the court in a footnote in its opinion. App. 20; *Burton*, 793 F. Supp. at 1336 n.2. Because all parties were in agreement and no litigation on these issues was required, the three-judge court properly found that the issues were not significant in the litigation and that Petitioners were not entitled to attorneys' fees. This ruling was entirely consistent with this Court's precedents. *See Farrar*, 506 U.S. at 109 (plaintiffs must succeed on a significant issue in the litigation to be considered "prevailing parties"); *Hensley*, 461 U.S. at 433 (same).[6] Even if Petitioners' success on these issues could technically qualify them as "prevailing parties," because the

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[6] *See also Jackson v. Stevenson*, 666 F. Supp. 99, 100-02 (S.D. Miss. 1986) (plaintiffs sought a declaration that the existing districts were unconstitutional, an injunction against their continued use, and a court order implementing new redistricting plans; *held*, attorneys' fees denied under the "catalyst" theory because "at the time plaintiffs filed suit, defendants had already begun the process of redistricting and [they] . . . conscientiously strove toward that end regardless of plaintiffs' actions"), *aff'd mem.*, 810 F.2d 197 (5th Cir. 1987).

issues were undisputed from the outset, such a victory can only be viewed as too technical and *de minimis* to warrant any attorneys' fees. *Farrar*, 506 U.S. at 113; *Texas State Teachers Ass'n*, 489 U.S. at 792 (technical victory may be too insignificant to qualify for "prevailing party" status).

(c) The three-judge court also properly held that its finding in February 1992 that the General Assembly was at an impasse did not merit an award of attorneys' fees. This ruling did not represent any victory on the merits for Petitioners, but rather was merely an interlocutory ruling that allowed the case to go forward. App. 22-23. As such, this ruling did not warrant a fee award. *See Hewitt v. Helms*, 482 U.S. 755, 760 (1987) (denying attorneys' fees when "[t]he most that [the plaintiff] obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim"); *Hanrahan*, 446 U.S. at 759 ("procedural or evidentiary rulings . . . may affect the disposition on the merits, but [are] themselves not matters on which a party could 'prevail' for purposes of shifting his counsel fees to the opposing party"). Moreover, like the issues of malapportionment and preventing future use of the plans, the issue of whether there was an impasse was basically undisputed. Thus, even if the ruling on the impasse issue had made Petitioners "prevailing parties," that success was purely technical and *de minimis* and, therefore, did not merit recovery of attorneys' fees. *See Farrar*, 506 U.S. at 113.[7]

(d) The three-judge court also properly found that Petitioners were not "prevailing parties" by virtue of

[7] It would be particularly inappropriate to award Petitioners attorneys' fees based on a finding of legislative impasse given that the impasse was caused by a veto of the General Assembly's plan by a Republican governor.

obtaining court-ordered plans for the 1992 elections. App. 24-25. As the court noted, Petitioners' primary objectives with respect to new redistricting plans were not simply to secure new redistricting plans, but rather to have their respective proposed plans adopted. App. 24. Consequently, the parties spent the bulk of the trial and the bulk of their fees advocating their proposed plans. The SRAC and the Republican Party each advocated a plan for the Senate with fourteen black-majority districts -- the maximum number possible. The three-judge court, however, soundly rejected maximization. *See Johnson v. De Grandy*, 512 U.S. 997, 1022 (1994) (Voting Rights Act does not require drawing the maximum possible number of majority-minority districts). In particular, the Republican Party advocated the drawing of a district in the Savannah River valley along South Carolina's western border that disregarded established communities of interest in order to create an elongated, non-compact black-majority district.[8] The three-judge court soundly rejected this district. *Burton*, 793 F. Supp. at 1360. Finally, the SRAC and the Republican Party argued that, in measuring whether the proposed plans had a discriminatory effect under Section 5 of the Voting Rights Act, the court should have compared them with each other, rather than with the pre-existing plans. The three-judge court soundly rejected this argument as well. *Id.* at 1347-48; *see Beer v. United States*, 425 U.S. 130, 141-42 (1976) (comparing proposed plan with pre-existing plan to determine whether proposed plan had a discriminatory effect). In short, Petitioners' proposed plans "suffered an array of infirmities," 793 F. Supp. at 1369, and the court-ordered plans "did not remotely resemble the plans proposed by either [Petitioner]." App.

[8] The SRAC advocated a similar district in its proposed plan.

25. In fact, the court's plan more closely resembled the plans proposed by the Senate than those advanced by Petitioners.

Hastert v. Illinois State Board of Election Commissioners, 28 F.3d 1430 (7th Cir. 1993), *cert. denied*, 115 S. Ct. 426 (1994), demonstrates that the three-judge court ruled correctly. There, relying on the principles set forth by this Court in *Hensley* and *Texas State Teachers Association*, the court held that a party whose proposed redistricting plan was rejected by the court could not be deemed a "prevailing party." 28 F.3d at 1439-43. In reaching this conclusion, the court explicitly rejected the losing party's argument that it prevailed because it "was a substantial factor in eradicating conduct that violates the Voting Rights Act." *Id.* at 1443. Here, as in *Hastert*, because their proposed plans were soundly rejected by the three-judge court, the SRAC and the Republican Party cannot be deemed "prevailing parties."[9]

The three-judge court also correctly ruled that the SRAC was not entitled to attorneys' fees as a result of this Court's decision to vacate the judgment of the three-judge

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[9] Noting that in redistricting litigation, the "winner, at least from a lay person's perspective, is the litigant whose plan and objectives (usually incorporated in its map) the district court adopted," the *Hastert* court stated, "Conveniently, this common-sense understanding of winners and losers coincides in large part with the Supreme Court's definition of 'prevailing party.'" *Hastert*, 28 F.3d at 1439. Under this standard, the party that came closest to prevailing was the Senate, since its proposed plan bore more resemblance than any other proposed plan to the plan ultimately drawn by the court for the Senate.

court and remand for further proceedings.[10] In *Hanrahan*, this Court ruled that plaintiffs are not "prevailing parties" when they convince an appellate court to reverse the trial court and to remand for additional proceedings. In that case, the trial court directed verdicts for the defendants in a civil rights action brought under 42 U.S.C. § 1983. The court of appeals reversed and remanded for a new trial. This Court held that the plaintiffs were not "prevailing parties" under 42 U.S.C. § 1988 because they had "not prevailed on the merits of any of their claims," but rather had demonstrated only that they "were entitled to a trial of their cause." 446 U.S. at 758; *see also Swietlowich v. County of Bucks*, 620 F.2d 33, 34 (3d Cir. 1980) (remand to trial court not sufficient, in and of itself, to make plaintiff a "prevailing party").

Thus, here (as in *Hanrahan*), Petitioners' entitlement to attorneys' fees cannot rest on their alleged success on appeal. Rather, they must demonstrate that they prevailed on some significant issue on the merits on remand. But Petitioners cannot make such a showing, because (even assuming the validity of the "catalyst" theory), the three-judge court did not find that the General Assembly's adoption of new plans following the remand rendered Petitioners "prevailing parties." And, as Judge Niemeyer stated in his concurrence in the court of appeals opinion, "the question of who prevailed, even when measuring the results obtained through the political process, is so unclear that whether we apply *S-1 and S-2* or evaluate who won in the political arena, I could not

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[10] As noted above, the Republican Party did not join the appeal to this Court, and thus cannot possibly recover attorneys' fees based on the appeal.

conclude that the district court abused its discretion in denying [Petitioners'] attorneys fees." App. 9.[11]

D. Petitioners' Alleged Success In Obtaining An Order Requiring The Senate To Preclear The Plan For The 1994 Special Election Was *De Minimis*

Both the court of appeals and the three-judge court found that Petitioners' success in obtaining a court order which required the Senate to submit the court-ordered plan for District One that had been used for the 1992 elections for preclearance before using it in a 1994 Senate special election was purely technical or ***de minimis*** and, therefore, did not justify an award of attorneys' fees. App. 8, 26. These findings are correct because this issue was collateral to the litigation, Petitioners' participation in the debate was superfluous, and the plan was precleared without any changes or objections.

Whether preclearance was required prior to the Senate's use of the 1992 court-ordered plan for District One in its 1994 special election was an entirely collateral issue to the redistricting litigation, which primarily concerned implementation of permanent redistricting plans in South Carolina based on the 1990 census. This Court ruled in *Hanrahan*, 446 U.S. at 758-59, that interlocutory or procedural victories that do not go to the merits of a claim, such as favorable discovery or evidentiary rulings,

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[11] Moreover, in light of the current litigation involving these same parties and district plans in which some black-majority districts have been ruled unconstitutional, *see Smith v. Beasley*, 946 F. Supp. 1174, 1210 (D.S.C. 1996), it would be premature to award attorneys' fees to Petitioners as "prevailing parties" based on enactment of these plans.

cannot render a party "prevailing" for purposes of attorneys' fees awards.

In addition, the preclearance debate, which was initiated by the Senate -- not Petitioners or the United States -- primarily involved only the Senate and the United States (specifically, DOJ). After directly contacting DOJ to ascertain its position, the Senate requested the three-judge court's guidance concerning whether preclearance was required in order to use the court-ordered plan for District One for the special election. DOJ then filed a response asserting that preclearance was required. While Petitioners also filed responses asserting the same position as DOJ, their presence was superfluous because DOJ was directly involved and performing its designated function to enforce Section 5.

Donnell v. United States, 682 F.2d 240, 245-49 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983), demonstrates why an award of attorneys' fees is not appropriate for this claim. In that case, a county Board of Supervisors filed an action against the United States seeking a declaratory judgment that its proposed districting plan complied with Section 5. Various private parties intervened in support of the United States. After the United States prevailed on the basis that the county had failed to demonstrate a nondiscriminatory purpose for the plan, these private parties sought attorneys' fees as "prevailing parties." *Id.* at 244. In remanding to the district court for further consideration, the appellate court held that, "[w]here Congress has charged a governmental entity to enforce a statutory provision, and the entity successfully does so, an intervenor should be awarded attorneys' fees only if it contributed substantially to the success of the litigation." *Id.* at 248-49. The court reasoned that "Congress did not intend to allow private

litigants to ride the back of the Justice Department to an easy award of attorneys' fees." *Id.* at 249. Here, Petitioners made minimal, if any, contributions to the debate between the Senate and DOJ concerning preclearance.

Finally, the ***de minimis*** nature of any arguable success by Petitioners on this issue is illustrated by the fact that, after submission to DOJ, the proposed district was precleared by DOJ without any objections or changes. Thus, while there may have technically been a procedural victory in obtaining a court order requiring the Senate to obtain preclearance of the plan, there was no success on the merits, as *Farrar* requires, because the district was used in exactly the same form in which it was submitted. This procedural victory alone is insufficient to render Petitioners "prevailing" on this issue. *See Hewitt*, 482 U.S. at 760 (stating that a plaintiff could not be a "prevailing party" where "[t]he most that [the plaintiff] obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim"); *see also Leroy v. City of Houston*, 831 F.2d 576, 578 (5th Cir. 1987) (noting related case denying attorneys' fees to parties who filed a complaint seeking an order requiring preclearance because defendant had already submitted plan at time complaint was filed, and plan was subsequently precleared), *cert. denied*, 486 U.S. 1008 (1988). Thus, for all of the foregoing reasons, Petitioners are not entitled to attorneys' fees based on the three-judge court's Section 5 preclearance ruling.[12]

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[12] Even if this Court were to determine that Petitioners are "prevailing parties" entitled to recover some attorneys' fees, the Senate cannot be assessed attorneys' fees because it is an intervenor defendant. *See Independent Fed'n of Flight*

(Footnote continued)

CONCLUSION

As demonstrated above, the petition for writ of certiorari should be denied.

Dated: March 6, 1997

Respectfully submitted,

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(Footnote continued)

Attendants v. Zipes, 491 U.S. 754, 761 (1989) (Court denied award of attorneys' fees against labor union that intervened in employment discrimination action, stating that attorneys' fees should not be awarded against an intervenor defendant unless the "intervenor['s] action was frivolous, unreasonable, or without foundation"). Moreover, the Senate enjoys legislative immunity from attorneys' fees liability for its legislative actions in the redistricting process. *See Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 738-39 (1980) (principle of legislative immunity precludes awards of Section 1988 attorneys' fees premised on the exercise or nonexercise of legislative powers).

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 96-1086(L), 96-1099

STATEWIDE REAPPORTIONMENT
ADVISORY COMMITTEE, *ET AL.*,

Plaintiffs-Appellants,

v.

DAVID M. BEASLEY,
Governor of South Carolina, *ET AL.*,

Defendants-Appellees.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

* * * *

[Page 10]

Appellants do not claim, as appellees contend, that they are prevailing parties based on catalyst theory. Brief for Defendants-Appellees, p. 16. The courts have, however, applied catalyst theory at "the secondary stage of evaluating the degree of success obtained" by a prevailing party. *Clark v. Sims*, 894 F. Supp. 868, 872 (D. Md. 1995). It is entirely appropriate for a court to take into account the benefits to the public at large and "the public

purpose served" by the litigation in determining a fee award. *Farrar v. Hobby*, 113 S. Ct. 566, 579 (1992) (O'Connor, J., concurring).

* * * *